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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WATSON BROS. TRANSPORTATION CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska, Omaha Division, is reported in 132 F. Supp. 905. The court's opinion and decree are set forth in the Appendix, *infra*, pp. 1a-21a.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The decree of

the district court was entered June 27, 1955, and notice of appeal was filed in that court on August 25, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the instant decree on direct appeal: *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 301 *et seq.*, are as follows:

> Sec. 207(a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *
>
> Sec. 212(a). * * * Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Com-

mission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder; * * *

QUESTION PRESENTED

Whether the Interstate Commerce Commission, having inadvertently issued a certificate to a motor carrier granting operating rights in excess of those which the Commission found to be required by public convenience and necessity, may without notice and hearing correct the certificate to make it conform to the findings.

STATEMENT

Appellee is a motor carrier whose certificate of public convenience and necessity, issued in 1947, authorized it to transport general commodities over approximately 84 separate regular and irregular routes, and dangerous explosives over 69 of those routes. In that year it applied to the Commission for added authority which would permit it to haul dangerous explosives over the remaining 15 routes.

During the hearing on this application, appellee, with the consent of the examiner and the other parties, orally amended it to include a request for authorization of service to four Army Ordnance plants which it was not then authorized to serve.[1] The examiner issued a report and order in which he found that the public convenience and necessity required granting appellee authority to transport "dangerous explosives" both over its existing routes, and to and from the four Army plants "as off-route points in connection with applicant's otherwise authorized operations."

No exceptions were filed to the examiner's report and, in accordance with settled practice, it became the Commission's report and order in May, 1949. However, the amended certificate which the Commission issued in July, 1949[2] did not restrict the

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[1] Appellee's counsel stated that "such amendment will not substantially broaden the scope of this application."

[2] The certificate, which was prepared by the Commission's clerical staff, was a long and complicated document which listed all of appellant's 84 routes throughout the Middle West.

carrier's authority to serve the four Army plants to hauling "dangerous explosives," but authorized it to transport "general commodities" (a broader category which includes explosives) to the plants as "off route points in connection with" its "authorized regular and irregular route operations."[3]

Four years later the Commission, without notice and hearing, issued a corrected certificate which authorized the carrier to haul Class A and B explosives to the four plants "in connection with [the] carrier's otherwise authorized regular route operations." The order amending the certificate recited that the grant of greater authority in the original certificate had been made "through inadvertence."

The carrier then filed suit before a three-judge district court to set aside the corrective order, and a majority of the court set the order aside. The court stated that the order 'purports to effectuate a change in an existing certificate"; that the "only statutory authority" for the "suspension, change or revocation" of a certificate is Section 212(a) of the Interstate Commerce Act which authorizes such action only after notice and hearing, and then only for willful violation of the Act; that the original certificate authorized the carrier to transport general commodities to the four points, but the amended certificate "restricts this authority" to the transportation of Class A and B explosives;

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[3] The certificate specifically authorized appellee to haul dangerous explosives over its remaining 15 routes.

and that the modification, having been made without notice and hearing and for reasons other than those permitted by Section 212(a), was invalid. The court stated that even if it were to "assume that the Commission has authority to correct clerical errors without notice and hearing," it would reach the same result since the Commission's action in this case "is more than the mere correction of a clerical error; and is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued."

Circuit Judge Johnsen, dissenting, stated that since Section 207(a) of the Act authorizes the Commission to issue a certificate only when it finds that the proposed service is required by the public convenience and necessity, any "purported * * * part of a certificate, which has been issued without such a finding as a basis for it, is legally void"; that the Commission found that public convenience and necessity required only that appellee be authorized to haul dangerous explosives to the four plants, and that there was no finding of public convenience and necessity "as to the hauling of any other commodities" to the plants; that Section 212(a) does not deny the Commission the "right to undertake to make an improperly issued certificate conform to the scope of the finding of public convenience and necessity made and required to underlie the certificate"; and that apart from Section 212(a) "there is no prescription otherwise in the statutes that requires the Commission to grant a hearing as a basis for the taking of the administrative action

by it to make the certificate here involved simply conform to the finding of public convenience and necessity existing in relation to it."

THE QUESTION IS SUBSTANTIAL

The district court set aside the Commission's order on the ground that it constituted "an attempt made contrary to Section 212 to revoke and change a certificate duly issued." But, as we shall show, the original certificate was invalid insofar as it purported to grant appellee the right to haul more than explosives, and the changes which the Commission made in that certificate merely conformed it to the operating authority which the Commission, in a formal report, had found was required by the public convenience and necessity. Such action, we submit, is not a "revocation" or a "change" of a certificate within the meaning of Section 212(a). It is simply the correction of an obvious inadvertency in the Commission's administrative process, and therefore can be done without notice and hearing.

1. Section 207(a) of the Act permits the Commission to grant a motor carrier a certificate only if it expressly finds, after hearing, "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *." The Commission, on the record before it, found only that the public convenience and necessity required that appellee be certificated to carry dangerous

explosives to the four Army plants; it made no findings with respect to general commodities. Insofar as the certificate purported to grant the greater authority to carry general commodities, it was beyond the Commission's power and, as the Commission stated, was issued "through inadvertence."

The corrections which the Commission ordered in 1953 did no more than conform appellee's operating authority to that which the Commission was authorized to and intended to grant in 1949. The 1949 findings contemplated that appellee would be certificated to haul "dangerous explosives" to the four plants as "off-route points" in connection with its "otherwise authorized operations." The original certificate, however, inadvertently authorized appellee to haul "general commodities" to the plants as "off-route points" in connection with its "authorized regular and irregular route operations." The corrected 1953 certificate authorized the carrier to haul Class A and Class B explosives to the plants in connection with its "regular route operations."

The only change of substance which the Commission made in the original certificate was to cut back the erroneous "general commodities" authority to the intended "explosives" authority. The other two changes — that from "dangerous" to "Class A and B" explosives; and that designating the four Army plants as off-route points on "regular route operations" instead of on "regular and irregular route operations"—did not alter the carrier's operating rights. The new description of

the explosives merely reflects the fact that in 1950 the Commission changed the class designations of explosives from "dangerous," "less dangerous" and "relatively safe" to "Class A," "Class B" and "Class C," respectively, without changing the substance of the categories. See *West Coast Fast Freight* v. *United States,* 205 F. 2d 249, 251 (C. A. 9). Thus, authority in 1953 to haul Class A and Class B explosives was the same as authority in 1949 to haul "dangerous" explosives. And since "irregular route operations" are defined in Section 208 of the Act as those "not over specified routes or between fixed termini," the description of off-route points on irregular routes is meaningless. The Commission's 1949 finding that public convenience and necessity required service to the four plants as off-route points on appellee's "otherwise authorized operations" plainly was intended to grant the carrier the authority which it has under the amended certificate—the right to serve the plants as off-route points on its *regular* routes.

Since, as we have shown, the findings authorized the Commission to certificate appellee to carry explosives but not general commodities to the plants, the purported grant of the authority to haul more than explosives was invalid. We submit that the Commission was not required to proceed under Section 212(a) in order to correct the certificate to eliminate the authority which it had improperly included. That Section, in our view, deals only with changes in certificates validly issued, and not with corrections of clerical error.

Section 212(a) provides that certificates "shall

be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided." It further provides that a certificate may be suspended, changed or revoked only after notice and hearing and only for willful failure to comply with the Act or any Commission regulation or order thereunder. And, before the Commission can revoke a certificate, it must give the holder 30 days within which to cease the violations. These provisions plainly were designed to protect the holders of *valid* certificates against change or revocation except in conformity therewith. They were not intended to, and do not, give a certificate holder the right to retain invalid operating authority which he received through inadvertence, merely because he has not otherwise willfully violated the Act. As Judge Johnsen stated in his dissenting opinion, a certificate "which has no legal substance or existence, from the lack of any power to grant it, would hardly have need to be 'suspended, changed or revoked' * * *" within the meaning of Section 212(a).

Although the court below did not in terms hold that the Commission cannot correct inadvertent error in a certificate without notice and hearing, it did state that the corrections here proposed would effectuate a change in an existing certificate, and that the "only statutory authority" for suspending, changing or revoking a certificate is Section 212(a). Since, as we have shown, the only change of substance made by the Commission was to cor-

rect the clerical error which gave appellee greater authority than it was entitled to, the practical effect of the decision below is to deny the Commission power to correct clerical error in a certificate unless it proceeds under Section 212(a). To deny such power to the Commission would mean that although the invalid certificate would be subject to successful challenge by a competitor of the carrier, the Commission itself could not correct the error unless it could show willful violations.

2. This Court has left open the question whether the Commission can correct inadvertent error in a certificate without notice and hearing. In *United States* v. *Seatrain Lines*, 329 U.S. 424, the Court found it unnecessary to "determine the Commission's statutory power to correct clerical mistakes" (p. 428), since it found that the issuance of the original certificate involved in that case "was not an 'inadvertent' error which the Commission's subsequent action was intended to correct" (p. 429). But in the instant case, as we have shown, the inadvertency is clear, and this case therefore directly presents the question which this Court did not reach in *Seatrain*.

In an agency as busy as the Commission, where a large number of certificates are prepared by clerks on the basis of Commission orders,[4] mistakes of this character are bound to occur. The Commission consistently has taken the position that it can correct clerical error in certificates without hear-

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[4] See *Frisco Transportation Company Extension*, 53 M.C.C. 415, 424-425.

ing,[5] and at least one district court apparently concurs in that view. See *Riss & Company* v. *United States*, 100 F. Supp. 468, 474 (W.D. Mo.), affirmed, 342 U.S. 937. The power of the Commission to correct inadvertent error is analogous to that of a court, under Rule 60(a) of the Federal Rules of Civil Procedure, to correct "of its own initiative" "[c]lerical mistakes in judgments, orders or other parts of the record * * *." The question whether the Commission has that power is an important one both to the Commission in the administration of the Interstate Commerce Act, and to other federal Agencies which administer similar statutory licensing provisions.

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[5] *E.g.*, *Santa Fe Trail Transp. Co. Extension*, 46 M.C.C. 775; *Greyhound Corporation Extension*, 46 M.C.C. 775; *Motor Rail Co. Application*, 49 M.C.C. 109. See, also, *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 472; 42 M.C.C. 211; *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717, 720.

CONCLUSION

We submit that the question presented by this appeal is substantial and that it is of general public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

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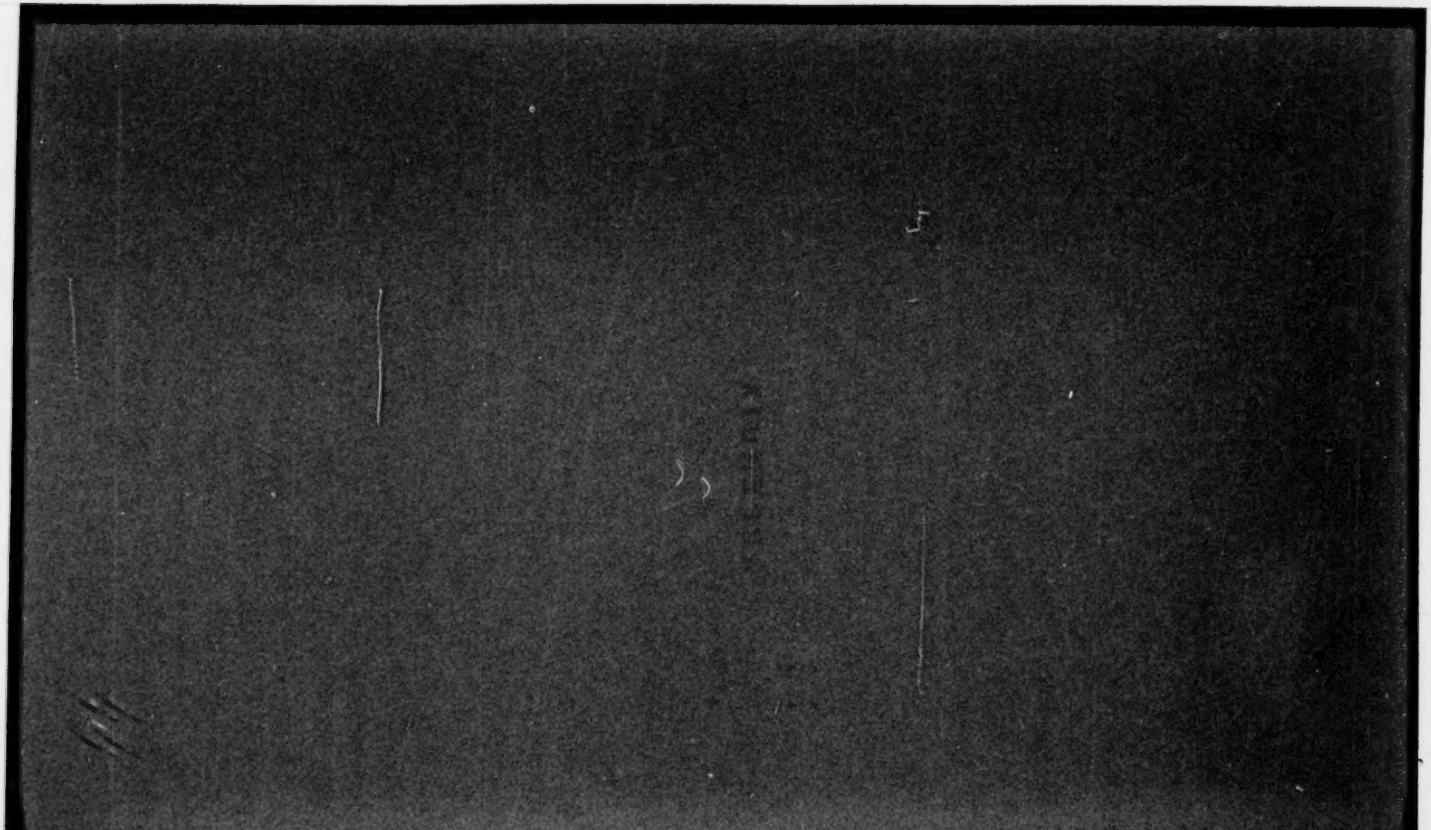
OCTOBER, 1955.



APPENDIX

UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION

No. Civil 52-54

WATSON BROS. TRANSPORTATION CO., INC., OMAHA, Nebraska, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MEMORANDUM

Before WOODROUGH and JOHNSEN, Circuit Judges, and DONOHOE, Chief District Judge

DONOHOE, Chief District Judge:

This is an action to set aside and annul an order of the Interstate Commerce Commission and to enjoin issuance pursuant thereto of a "corrected" Certificate of Public Convenience and Necessity to Plaintiff. This court has jurisdiction, 28 U. S. C. (1952 Ed.) 1336, 1398; and, as required, a three-judge court has been appropriately convened to determine the matter, 28 U. S. C. (1952 Ed.) 2321, 2325, 2284.

The salient facts are neither complex, nor disputed. Plaintiff, Watson Bros. Transportation Co., is engaged in the interstate transportation of freight by motor carrier; and prior to the year 1947 had been granted various operating rights by

the Interstate Commerce Commission. On December 22, 1947, these rights were consolidated in a single Certificate of Public Convenience and Necessity issued by the Commission. This certificate authorized plaintiff to engage in the transportation of general commodities on approximately eighty-four separate routes. On sixty-nine of these routes, the grant of authority to transport general commodities included the right to transport explosives. On fifteen of these routes, however, plaintiff was to authorized to transport dangerous explosives.

On September 30, 1947, plaintiff filed an application with the Commission for a Certificate of Public Convenience and Necessity authorizing the transportation of explosives on "all the routes" over which plaintiff was authorized to haul general commodities. An amendment expressly designating the routes over which plaintiff sought authority to transport explosives was subsequently filed. A hearing was held upon the application, as amended, in Omaha, Nebraska, on February 3, 1949; and during the course of the hearing it developed from the testimony of a witness for the Department of the Army that there was no motor carrier service at the following installations: Rocky Mountain Arsenal, near Denver, Colorado; Iowa Ordnance Plant, near Burlington, Iowa; Sunflower Ordnance Plant, near DeSoto, Kansas; and Savanna Ordnance Plant, near Savanna, Illinois. Consequently plaintiff requested orally at the hearing permission to amend its application so that it would include a request for authority to serve these four points.

The record shows:

"Mr. Kaplan (for Watson Bros.): If the Examiner please—Mr. Buster, if you will excuse me—prior to presenting intervener's case the applicant at this time requests permission to amend its application in conformity with the proof that has been offered, and it is suggested by this counsel that such amendment will not substantially broaden the scope of this application.

"This applicant is not authorized to serve the Iowa Ordnance Plant, the Sunflower Ordnance Plant, the Savanna Ordnance Depot and the Rocky Mountain Arsenal. The Iowa Ordnance Plant is located approximately six miles west of Burlington, Iowa. This applicant is authorized to operate over U. S. Highway 34, which is less than six miles from the Iowa Ordnance Plant.

"The Sunflower Ordnance Plant at DeSoto, Kansas, is less than 10 miles south of U. S. Highway 40 over which route the applicant is authorized to serve.

"The Savanna Ordnance Depot is some several miles, and this counsel does not know how many miles, from Freeport, Illinois, which is authorized to this applicant.

"In addition, the Rocky Mountain Arsenal is only two miles from Denver, Colorado. With that explanation, applicant respectfully moves permission to amend its application so as to be able to serve to and from the Iowa Ordnance Plant near Burlington, Iowa; the

Sunflower Ordnance Plant near DeSoto, Kansas; the Savanna Ordnance Depot near Savanna, Illinois, and the Rocky Mountain Arsenal near Denver, Colorado.

"Exam. Garofalo: That is the Rocky Mountain Arsenal?

"Mr. Kaplan: Yes, sir.

"Exam. Garofalo: Are there any objections?

"Mr. Buster (for intervener): If counsel is agreeable to restricting the authority sought to service for the United States Government there is no objection. I reason I raise that question is for tack-on purposes.

"Mr. Kaplan: That stipulation will be quite agreeable. We certainly join in it.

"Mr. Buster: No objection.

"Exam. Garofalo: If there are no further objections, the amendment is allowed."

On April 13, 1949, the trial examiner filed his recommended report and order which contains the following finding:

"The examiner finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of dangerous explosives to, from, or between points over the regular routes and irregular routes as shown in the appendix hereto, and to and from the sites of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sun-

flower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., as off route points in connection with applicant's otherwise authorized operations.

"The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's Rules and Regulations thereunder; and that an appropriate certificate should be issued."

Plaintiff was served a copy of the examiner's recommended report and order on April 15, 1949. No exceptions to this recommended report and order were taken and on May 18, 1949, the time for taking exceptions expired, and the order of the examiner became effective as the order of the Commission.

On July 19, 1949, the Commission issued to plaintiff a Certificate of Public Convenience and Necessity containing the following material provisions:

"AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

"IT IS ORDERED, That the said carrier be, and

it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

"It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

* * * * *

"*General commodities,* except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, and commodities requiring special equipment.

* * * * *

"Service is authorized to and from the site of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near De-Soto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., as off-route points in connection with said carrier's authorized regular and irregular route operations.

"It is Further Ordered, and is made a condition of this certificate that the holder thereof

shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

After the issuance of this Certificate of Public Convenience and Necessity plaintiff expended substantial sums of money for equipment to be used in rendering the service required by the beforequoted paragraphs of the Certificate; and plaintiff has continuously from the time of the issuance of the certificate to the present time engaged in the transportation of general commodities to the four ordnance plants covered by the certificate issued July 19, 1949.

On August 25, 1953, the Commission sua sponte issued the following order relating to plaintiff's certificate:

" ORDER IM-141-H

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 25th day of August, A.D. 1953

No. MC 70451

WATSON BROS. TRANSPORTATION CO., INC.,
OMAHA, NEBRASKA

Upon further consideration of the record in the above-entitled proceeding;

It appearing, That the corrected report and recommended order of April 13, 1949, which

became effective May 18, 1949, in No. MC 70451 Sub 72, authorized the issuance of a certificate for the transportation of *dangerous explosives* (Now designated Class A and B explosives) 'to and from the sites of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., in connection with applicant's otherwise authorized operations'.

It further appearing, That pursuant to said report and order of May 18, 1949, the above-described authority was consolidated with other authority specified in Certificate No. MC 70451 issued December 22, 1947, and that thru inadvertence such authority was shown as a service clause in connection with the operation set forth below:

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, and commodities requiring special equipment, over irregular routes,

Between Minneapolis, St. Paul, South St. Paul, Ivergrove, West St. Paul, Newport, North St. Paul, Columbia Heights, Robbinsdale, St. Louis Park, Hopkins, Edina, Richfield, Red Rock, Mc-

Carron's Lake, Fort Snelling, and State Fair Grounds, Minn.

Service is authorized to and from the site of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., as off-route points in connection with said carrier's authorized regular and irregular route operations.

And it further appearing, That such authority should have been set forth as a general service clause as follows:

Class A and B explosives.

Service is authorized to and from the off-route points of the sites of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., in connection with carrier's otherwise authorized regular route operations.

and good cause appearing therefor:

It is ordered, That a corrected certificate be issued Watson Bros. Transportation Co., Inc., in No. MC 70451 and that such authority therein be set forth as outlined above.

It is further ordered, That in all other respects the said Certificate No. MC 70451, issued July 19, 1949, shall remain in full force and effect.

And it is further ordered, That this order shall become effective on October 5, 1953, unless prior thereto it is otherwise ordered.

By the Commission, division 5.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

On January 4, 1954, plaintiff filed a petition with the Commission for indefinite postponement and for reconsideration, and to vacate and set aside the Commission's order of August 25, 1953. On June 7, 1954, the Commission entered an order denying the relief requested and plaintiff, on July 1, 1954, filed its complaint in this court seeking an order setting aside and declaring void the order of August 25, 1953, and enjoining the issuance of the proposed "corrected" certificate.

Discussion

The order under attack purports to effectuate a change in an existing Certificate of Public Convenience and Necessity issued by the Commission to Watson Bros. The only statutory authority for the suspension, change or revocation of such a certificate by the Commission is contained in Section 212(a) Part II, of the Interstate Commerce

Act, 49 U.S.C. (1952 Ed.) 212(a). The pertinent portion of this section reads as follows:

> "Certificates . . . shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate . . . may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder . . ."

The Certificate issued July 19, 1949, granted plaintiff authority to transport "general commodities" to and from four designated ordnance plants. The order of August 25, 1953, restricts this authority to the transportation of Class "A" and "B" explosives. Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.

Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made

contrary to Sec. 212 to revoke and change a certificate duly issued.

The court finds that the plaintiff will suffer great loss and damage by the threatened order for which it has no adequate remedy except by injunction.

For the reasons stated, an injunction should issue. Counsel for the plaintiff shall prepare and submit for approval the appropriate order to be entered in keeping with this memorandum.

Adopted:

(S.) JOSEPH W. WOODROUGH,
Circuit Judge.

J. A. DONOHOE,
District Judge.

JOHNSEN, Circuit Judge, dissenting:

The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing.

I respectfully dissent from this view, for the reason (1) that I do not believe that there is any statutory prescription for a hearing as to such an unauthorized, purported certificate-grant, and (2) that I am unable to see how it legally can be claimed

that any substance or any color of rights exists, to whatever operations the certificate may purport to cover which plainly are beyond or contradictory of the scope or limits of the public convenience and necessity found, as a basis or foundation for any contention of requirement or need for a hearing generally.

What is there that the holder could possibly contend or argue in such a situation, as a matter of hearing accorded, that would at all enable the language of a certificate legally to override and nullify the scope of the public convenience and necessity fixed by the finding, which the statute makes requisite to the very issuance of the certificate?

Under 49 U. S. C. A., § 307, the Commission has power or authority to issue a certificate of public convenience and necessity for motor carrier operation (except as to grandfather rights under § 306 (a), only "*if it is found* * * * that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity * * *." (Emphasis mine.)

The plain effect of this statutory requirement seems to me to be that any purported certificate or part of a certificate, which has been issued without such a finding as a basis for it, is legally void, as not being capable of constituting an exercise of Commission auhority or a grant of operator rights under the statute.

In the situation before us, the finding of public

convenience and necessity made as to operations by Watson Bros. to and from the four ordnance plants that are involved was as to the hauling "of dangerous explosives." There was no finding of public convenience and necessity as to the hauling of any other commodities, as a basis for granting any additional hauling rights. Watson Bros. acceded to the limits of the convenience and necessity found, by not taking any exceptions to or making other legal attack upon the finding, and the Commission in regular course directed the issuance of a certificate in effectuation of its finding.

The certificate, as drawn, however, recited that "Service is authorized to and from the site of (each of the four ordnance plants involved) as offroute points in connection with said carrier's authorized regular and irregular route operations." The words, "of dangerous explosives," were in some way not included in the recitation of the certificate, and Watson Bros., without any inquiry of the Commission as to the obvious discrepancy between the finding and the certificate, and perhaps with no desire to make any such inquiry, began to engage in the operation of transporting general commodities, and not just dangerous explosives, to and from the ordnance plants.

What then, as matter of fair and necessary administrative reach, was the Commission entitled to do, when it discovered what had occurred in relation to the issuance and the use of its certificate? If I am correct in my view that a certificate or any part of a certificate that purports to grant opera-

tion rights, for which there exists no finding of public convenience and necessity, is legally void, then there cannot possibly be any basis for a carrier to object to, argue legal prejudice from, or seek to prevent, any attempt by the Commission, in eliminating shadows for enforcement purposes, to call in such a certificate for correction or reissuance, or to make a declaration of nullity, or to enter an order against the carrier, or to take any other incidental administrative step, the sole purpose and the only effect of which action are a conforming of the language of the certificate to the actual scope of the existing finding, on which alone, as I have stated the right of the Commission to issue the certificate rested.

I am unable to agree with the contention of Watson Bros., which the majority here accepts, that the Commission has no right to undertake to make an improperly issued certificate conform to the scope of the finding of public convenience and necessity made and required to underlie the certificate, except upon the basis of 49 U. S. C. A., § 312 (a). That section provides: "Certificates * * * shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate * * * may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed or revoked, in whole or in part, for willful failure to comply with

any provision of this chapter, or with any lawful order, rule, or regulation of the Commission, or with any term, condition, or limitation of such certificate * * *."

It will be noted that this statutory provision gives the Commission the right to touch certificates only in relation to some willful violation of statute, of lawful orders, rules, or regulations of the Commission, or of terms, conditions, or limitations of the certificate—all of which, as the word "willful" manifestly implies, are matters of conduct in the holder's operations. If this provision is the measure or limit of the Commission's right to deal with legally unauthorized certificates, then necessarily the Commission is unable at all, just as in the case of authorized certificates, to touch any such certificates or the operations being carried on under them, so long as the holder refrains from engaging in a willful violation of any statute, of any lawful order, rule, or regulation of the Commission, or of any term, condition, or limitation of his purported certificate, in the carrying on of operations under the certificate.

In other words,—and this is in fact the effect of Watson Bros.' argument here—if an unempowered or unauthorizd certificate or part of a certificate chances to be issued by the Commission, with no finding of public convenience and necessity as a basis for its issuance, the whole thing is simply too bad for everybody (except the certificate holder), including the public interest which the Act was designed to serve, because 49 U. S. C. A., § 312

(a), even on a hearing, does not allow the Commission to touch any certificate, whether lawfully or unlawfully issued, unless the holder, in carrying on his carrier operations under the authority of the certificate, engages in some willful conduct of violation of statute, commission regulation, or certificate terms, as previously mentioned, in the mode of his operation.

I reject that construction of § 312 (a), as being both unreasonable and unnecessary. Having regard for the possible consequences of such a construction upon the public interest in relation to unauthorized certificates, and keeping in mind that rights to operate as a motor carrier can not at all be granted or have validity under § 307, supra, except upon the basis of public convenience and necessity having been found, it seems to me that § 312 (a) logically has and reasonably can have application only to certificates which the Commission has lawfully issued, and not to purported certificates or parts of certificates which the Commission possesses no power or authority under § 307 to issue. I am further persuaded to this view, because that which has no legal substance or existence, from the lack of any power to create it, would hardly have capacity or need to be "suspended, changed, or revoked," in a legal sense or as a question of legal effect.

With § 312(a) not being required to be regarded as having application to legally unauthorized certificates, there is no prescription otherwise in the statutes that requires the Commission to grant a

hearing as a basis for the taking of administrative action by it to make the certificate here involved simply conform to the finding of public convenience and necessity existing in relation to it. And, as I have said, in view of § 307, it is not possible to contend that such an unauthorized certificate can give rise to any substance or color of legal rights to operate, which, apart from any statutory prescription for hearing, would entitle Watson Bros. to a hearing as a matter of general procedural due process. Nor can Watson Bros. seek to induce relief here on the basis and scope of the unlawful operations which they have been carrying on in the past and the present existence of public convenience and necessity which those operations may perhaps be capable of demonstrating. These are matters that are only open to consideration on a new application before the Commission for a certificate of public convenience and necessity as to general commodities, and not as a matter of any possible legal relationship to the finding of public convenience and necessity previously made and the certificate entitled to be issued on the basis thereof.

I am accordingly unable to see any basis for the granting of an injunction allowing Watson Bros. to continue to haul general commodities to and from the ordnance plants involved. All that Watson Bros. can have or ever have had any lawful right to haul, under the finding of public convenience and necessity made by the Commission, is "dangerous explosives."

Other contentions in relation to the Commission's action as to the certificate have been made by Watson Bros., which the majority opinion does not reach. I shall accordingly not consider them either. They go entirely to the matter of hauling explosives and have no relationship to the question of the right of the Commission to keep Watson Bros. from continuing to haul general commodities as opposed to dangerous explosives. To me, the Commission clearly had the right to correct the certificate issued Watson Bros., to exclude general commodities from the recital of their operation rights and to leave those operation rights applicable to dangerous explosives only, in accordance with the finding of public convenience and necessity made and in relation to the power or authority of the Commission to issue a certificate only on the basis of that finding. To hold otherwise is to hamper the Commission in the performance of its busy functions, by requiring it to conduct a useless hearing in relation to something that is utterly without any possible substance or color as a basis of legal operating rights.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICTOF NEBRASKA, OMAHA DIVISION

Civil Action No. 52-54

WATSON BROS. TRANSPORTATION CO., INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

PERMANENT INJUNCTION

This cause came on to be heard upon the complaint and exhibits thereto, and evidence adduced, to enjoin the issuance of a corrected certificate, and for other relief, dated July 1, 1954, and after argument by counsel for both sides in open court, and it appearing to the satisfaction of a majority of the court that Section 212(a) of the Interstate Commerce Act is the only statutory authority for the suspension, change, or revocation of certificates by the Commission, that the order of the Commission dated August 25, 1953, was issued without notice and hearing as required by said section of the Act, and for reasons other than those stated in said section, and is therefore invalid; that even if the Commission has authority to correct clerical errors in certificates without notice and hearing, the order of August 25, 1953, does more than merely correct a clerical error and is an attempt to revoke and change the certificate

contrary to Section 212(a) of the Act; and that the plaintiff will suffer great loss and damage by the threatened order for which it has no adequate remedy except by injunction.

Adjudged, ordered, and decreed, pursuant to the majority opinion filed herein, That the defendants, The United States of America and the Interstate Commerce Commission, be and they are hereby permanently restrained and enjoined from enforcing the order of the Interstate Commerce Commission, dated August 25, 1953, in No. MC-70451, and from issuing a corrected certificate revoking, amending, or changing in whole or in part the operating rights of plaintiff now embraced in consolidated certificate No. MC-70451 dated July 19, 1949.

(S.) JOSEPH W. WOODROUGH,
Judge.

(S.) J. A. DONOHOE,
Judge.

Seen:

(S.) JAMES H. DURKIN,
(S.) LEO H. POU,
Attorneys for Defendants.

Filed District of Nebraska, June 27, 1955, Mary A. Mullen, Clerk.

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No. 490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

WATSON BROS. TRANSPORTATION CO., INC.

On Appeal from the United States District Court for the District of Nebraska

MOTION TO AFFIRM

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v.

WATSON BROS. TRANSPORTATION CO., INC.

On Appeal from the United States District Court for the District of Nebraska

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, appellee Watson Bros. Transportation Co., Inc., hereinafter called Watson, moves the court to affirm the judgment sought to be reversed on appeal on the ground that it is manifest that the question on which the decision of the court depends is so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal, pursuant to 28 USC 1253 and 2101(b), from the final judgment entered June 27, 1955 by a specially constituted three-judge district court, convened pursuant to 28 USC 2284 and 2325, permanently restraining and enjoining enforcement of an order of the Interstate Commerce Commission, hereinafter called the Commission, entered August 25, 1953 under docket No. MC-70451, *Watson Bros. Transportation Co., Inc.*

The said order of the Commission, set forth in the appendix to appellants' Jurisdictional Statement, pp. 7a-10a, averred in substance that the operating rights embraced in the certificate issued to Watson on July 19, 1949 had been inadvertently described and directed that a "corrected certificate be issued". *The order did not state that the certificate itself had been inadvertently issued.*

Under its certificate of July 19, 1949, Watson is authorized to, and does, engage as a motor-common carrier in the transportation of general commodities "to and from the site of the Rocky Mountain Arsenal near Denver, Colo., Iowa Ordnance Plant near Burlington, Iowa, Sunflower Ordnance Plant near DeSoto, Kans., and Savanna Ordnance Plant near Savanna, Ill., as off-route points in connection with said carrier's authorized regular and irregular route operations." The effect of the Commission's order was to revoke a substantial and valuable portion of the foregoing rights. Specifically, it would revoke (1) the right to transport general commodities, substituting in lieu thereof the right only to transport Class A and B explosives; (2) the right to transport

Class C explosives; and (3) the right to serve between the named Government installations, on the one hand, and, on the other, points in its irregular-route territory, leaving it authority to serve only between the installations and points on its regular routes.

The order was issued by the Commission without notice and without affording Watson an opportunity to be heard prior to its promulgation and entry; and this despite the fact that the certificate had been in effect for more than four years and, as the Commission was fully aware was its purpose, the operations authorized by it had during that period been integrated into and made part and parcel of Watson's system of operation and would, if voided, have a disruptive effect on its system generally.

Watson's certificate had these antecedent facts. On December 22, 1947 its various separately granted operating rights were consolidated into a single certificate embracing approximately 84 separate regular and irregular transportation routes over which it was authorized to transport general commodities. On about 69 of these routes the authority included dangerous explosives, but on the remaining 15 there was a restriction against the transportation of dangerous explosives. Prior to the issuance of the consolidated certificate Watson, on September 30, 1947, filed an application under section 207 of the Interstate Commerce Act (49 USC 307) seeking a certificate of public convenience and necessity authorizing the transportation of "explosives over all routes carrier is now authorized to haul general commodities". The clear intent of the application was to have uniform authority for the hauling of general commodities, including all classes of explosives, over all of Watson's trans-

portation routes, which would be accomplished by deleting the restriction against the hauling of explosives applying on the few routes above mentioned. Although under the Commission's rules carriers holding general-commodity authority excluding dangerous explosives were allowed to transport Class C explosives (e.g. "relatively safe explosives, minimum hazard") and Watson was accordingly transporting the same under its general commodity authority, its application asked for the privilege of hauling explosives without regard to whether they were dangerous or otherwise.

The evidence adduced before a Commission examiner at a hearing on the application showed that the restriction against Watson's handling of explosives over a portion of its system of routes operated to the inconvenience both of Watson and of the Government which relied upon Watson for the transportation of a large quantity of its explosive traffic. The few routes over which it was not authorized to transport explosives were intermingled with those over which it could do so. For example, its route between Omaha, Nebr., and Denver, Colo., over U. S. Highway 6 authorized the transportation of explosives between the respective termini but not at the intermediate points. Under authority of another route it was authorized to serve the said intermediate points but not in the transportation of explosives. The purpose of the application, as stated at the hearing, was to enable Watson "to transport explosives throughout and over its entire system" wherever it was authorized to handle general commodities.

An official of the Department of the Army appeared and offered testimony at the hearing showing that the public interest required that the restriction against

the handling of explosives be removed so that Watson could handle explosives over all of its routes. This testimony developed the further fact that there were four Government installations outside the scope of the application which Watson was unauthorized to serve, to and from which its services were also required; to wit, the Rocky Mountain Arsenal, Iowa Ordnance Plant, Sunflower Ordnance Plant, and Savanna Ordnance Plant. The Army witness testified that these four installations were without motor carrier service at all and that the Government had need for such service. In the light of this testimony, Watson's counsel requested permission to amend the application so as to include a request for authority to serve the four installations.[1]

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[1] In proposing the amendment, Watson's counsel stated:

" • • • the applicant at this time requests permission to amend its application in conformity with the proof that has been offered, and it is suggested by this counsel that such an amendment will not substantially broaden the scope of this application.

"This applicant is not authorized to serve the Iowa Ordnance Plant, the Sunflower Ordnance Plant, the Savanna Ordnance Depot, and the Rocky Mountain Arsenal. The Iowa Ordnance Plant is located approximately 6 miles west of Burlington, Iowa. This applicant is authorized to operate over U. S. Highway 34 which is less than 6 miles from the Iowa Ordnance Plant.

"The Sunflower Ordnance Plant at DeSoto, Kans., is less than 10 miles south of U. S. Highway 40 over which route the applicant is authorized to serve.

"The Savanna Ordnance Depot is some several miles, and this

The amendment, to which there was no objection and which was allowed by the examiner, clearly intended to cover the needs for Watson's service to and from the four installations testified to by the Army witness. This need obviously embraced as a bare minimum all types of explosives, whether Class A, B or C, as well as all components and materials required by the Government in its manufacturing operations at those installations.

The examiner served his report and order recommending that the restriction against dangerous explosives be removed from Watson's existing routes as sought in the application, and finding in addition that—

> "the present and future public convenience and necessity require operation by [Watson] as a common carrier by motor vehicle, in interstate or foreign commerce, of dangerous explosives * * * to and from the sites of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., as off-route points in connection with [Watson's] otherwise authorized operations."

---

counsel does not know how many miles, from Freeport, Ill., which is authorized to this applicant.

"In addition, the Rocky Mountain Arsenal is only 2 miles from Denver, Colo.

"With that explanation, applicant respectfully moves permission to amend its application so as to be able to serve to and from the Iowa Ordnance Plant near Burlington, Iowa, the Sunflower Ordnance Plant near DeSoto, Kansas, the Savanna Ordnance Depot near Savanna, Ill., and the Rocky Mountain Arsenal near Denver, Colo."

No exceptions were filed to the recommended order; and not having been stayed by the Commission, it accordingly became effective as the order of the Commission on May 18, 1949, the Commission issuing no report of its own. In framing his recommended findings, the Examiner seemingly overlooked the fact that the four installations were without motor carrier service at all and that the only reasonable interpretation of the amendment to the application was that it was intended to enable Watson to meet the Government needs for all types of explosives as well as other commodities required in its manufacturing operations. In drafting the certificate the Commission, and we submit intentionally, changed the authority (indeed, corrected the examiner's failure to grasp the military needs) to general commodities and made it conform to the purport of the evidence by affording to the Government a motor carrier service on all classes of explosives as well as all other commodities used or needed by the four installations. This was but a common sense exercise of the Commission's discretion in carrying out the national transportation policy which directs that all provisions of the act be so administered as to meet, among other things, the needs of the national defense. In addition, the Commission, apparently in the interest of precision, changed the examiner's grant of authority to serve the installations "as off-route points in connection with [Watson's] *otherwise authorized operations*" to read "as off-route points in connection with said carrier's *authorized regular and irregular route operations*". (emphasis added)

After the lapse of more than four years the Commission, as stated, summarily issued its order undertaking radically to reduce Watson's certificated

authority. Although it had afforded Watson no opportunity to adduce any facts or evidence, the Commission with equal summariness denied its petition for reconsideration of the order, on the ground "that no additional facts or evidence have been adduced to warrant a reversal or further postponement of the order".

At the trial before the three-judge district court the appellants agreed to the stipulation "that issuance of the proposed order by the Interstate Commerce Commission will result in substantial economic loss and damage to [Watson]". The district court by majority opinion found that the Commission's order "was more than the mere correction of an error; and is an attempt made contrary to sec. 212 to revoke and change a certificate duly issued"; and that since it "was issued without notice and hearing and for reasons other than those stated in Section 212(a) it is invalid". The finding of the district court that no error had been made was entirely proper and was the only reasonable conclusion to be drawn from the facts and circumstances before the court. The Commission presented no evidence at all to the court to support its allegation that an error had been made; and accordingly the court was forced to make its determination on the basis of the circumstances existing at the time the authority was granted.

THE QUESTION IS UNSUBSTANTIAL AND NEEDS NO FURTHER ARGUMENT

1. The three-judge district court properly found that no error had been made in authorizing service at the installations in connection with Watson's authorized irregular-route operations

One of the three errors which appellants allege were made by the Commission in drafting the certificate was granting the right to serve the four installations as "off-route points" in connection with Watson's "authorized * * * irregular route operations". Appellants misleadingly assert in their Jurisdictional Statement that revocation of this authority "did not alter the carrier's operating rights". This is patently incorrect, indeed contrary to the stipulation agreed to by appellants in the court below "that the proposed order by the Interstate Commerce Commission will result in substantial economic loss and damage to the plaintiff". Under this authority Watson is permitted (and its legal right to do so has never been disputed by the Commission either before or during this proceeding) to operate between the installations, on the one hand, and, on the other, its authorized irregular-route points and territories. Specifically, it is authorized to serve between such installations and all points in Iowa, practically all points in Nebraska, numerous points in Illinois, Missouri and Kansas, and a lesser number of points in Indiana and Minnesota. Clearly, the revocation of this authority would substantially alter Watson's certificate.

Appellants, although offering no factual substantiation, contend that this authority was inadvertently granted. The facts, however, belie the claimed inadvertence. The application as originally filed by

Watson with the Commission requested authority to haul explosives "over all routes carrier is now authorized to handle general commodities". A subsequent amendment filed at the Commission's suggestion requested authority "to transport explosives on [Watson's] regular and irregular routes * * * ", and listed each specific regular *and irregular* route. The evidence presented at the Commission hearing clearly showed that the authority sought and needed was between the installations and all points served by Watson on its regular *as well as irregular routes.* The examiner's recommended report and order granted authority to operate to and from the installations as off-route points in connection with Watson's "otherwise authorized operations". The "otherwise authorized operations" *included the irregular route operations.* Finally, the certificate likewise granted such authority, merely substituting for the phrase "otherwise authorized operations" the more precise phrase "authorized regular and irregular route operations"—a deviation in form, not substance. Accordingly, it is perfectly clear *that the certificate grants the authority sought by the application, supported by the evidence, and found by the examiner to be required by the public convenience and necessity.*

Where then is the "obvious inadvertency" that appellants contend may be corrected without notice and hearing? Appellants do not allege that it was a mechanical or clerical inadvertency. Instead, they assert that section 208 of the Act describes irregular-route operations as those not over specified highways or between fixed termini; that accordingly the description of off-route points on irregular routes is mean-

ingless; and that the grant of authority "plainly was intended" to give only "the right to serve the plants as off-route points on its regular routes". In other words, their position is not that an error was made in authorizing Watson to operate between the installations and the irregular route territory, *but simply that the Commission used the wrong words in describing the authority.* Their argument adds up to the bald proposition that because the language employed by the Commission in drafting the certificate was carelessly chosen as to form, the result constitutes an inadvertency which the Commission may correct, not by changing the inept language, but by wiping out the valid and substantive right which was sought, proved, and intentionally granted. And with language just as inept, appellants here describe the Commission's order as merely correcting an inadvertence without altering Watson's operating rights! If the language lacked a desired nicety of expression, the appropriate remedy was the correction of the language, *not the revocation of the validly granted right itself.*

We submit that there was no inadvertent error in granting Watson authority to serve between the installations and its irregular points and territories; that the certificate is valid with respect thereto; and that the three-judge district court properly refused to countenance the arbitrary and unconscionable attempt of the Commission to revoke this authority on the pretext of a non-existent error—all without notice and without hearing.

2. The three-judge district court properly found that no error had been made in authorizing Watson to transport Class C explosives

The second error which appellants allege is contained in the certificate is authority to transport Class C explosives, which authority the Commission's order would revoke. Appellants here likewise contend that the revocation of Class C explosives "did not alter the carrier's operating rights". Again, they seemingly forget their stipulation, *supra,* that the Commission's order would result in substantial economic loss and damage to Watson. Aside from this, however, their contention here is rebutted by Exhibit 2 which was stipulated into evidence by appellants at the trial before the district court. This exhibit shows for instance, that from one-fourth to one-third of the 102,229,038 pounds of explosives handled by Watson during 1954 at the Iowa Ordnance plant alone consisted of Class C explosives. Revocation of the right to handle this traffic would clearly, therefore, constitute a substantial alteration of Watson's operating rights. Indeed, as in the case of the irregular-route authority, such revocation would defeat the very purpose for which the authority was sought and granted—namely, to give Watson uniform authority to transport all classes of explosives over all of its transportation routes.

Appropriate at this point is an explanation of the meaning of Class A, B and C explosives. Pursuant to the Act of March 4, 1921 as amended relative to the transportation of "explosives and other dangerous articles" (now 18 U.S.C. 831-835), the Commission issued regulations, subsequently made applicable to motor carriers when the latter came under regulation,

dividing explosives into Class A, B and C. Class A is defined as "dangerous explosives, detonating and/or otherwise of maximum hazard"; Class B as "less dangerous explosives, inflammable hazard"; and Class C as "relatively safe explosives, minimum hazard". (49 C.F.R. 73.50, 73.53, 73.88, 73.100) Included under Class C are such articles as small arms ammunition, explosive cable cutters, fuses, igniters, primers, and explosive resets.

Appellants' contention that the Commission's inclusion of authority to transport Class C explosives was an error is utterly without merit. Watson's application to the Commission requested authority simply to transport "explosives" without regard to class. At no point did the testimony presented at the Commission hearing suggest that only Class A and B were to be handled. To the contrary, the commodities were repeatedly described simply as "explosives", and the examples listed in the testimony included not only such articles as TNT but also small arms ammunition, which is a Class C explosive. There can be no dispute but that the testimony clearly showed a need by the Army for a complete service on all types of explosives, there being no motor carrier service available to it at that time.

Appellants urge (at page 9 of the Jurisdictional Statement) that authority in 1953 to haul Class A and B explosives was the same as authority recommended by the examiner in 1949 to haul "dangerous explosives", citing apparently in support thereof *West Coast Fast Freight* v. *United States,* 205 F. 2d 249, 251. That case, however, involved the prosecution of a carrier authorized to transport general commodities except dangerous explosives for transporting danger-

ous explosives. The issue was whether the articles transported were dangerous explosives. The court found that they were. We do not interpret the decision as support for appellants' contention. To the contrary, in referring to the elimination from the regulations of the word "dangerous" before explosives, the court stated:

> "We see a valid reason for eliminating the word 'dangerous'. It is superfluous. When you say an explosive is a hazard, you say it is dangerous, and if it is a maximum hazard it is extremely dangerous. So, it seems clear that explosives listed by the regulations as maximum hazards are not only dangerous but extremely so."

Inasmuch as all three classes (A, B, & C) of explosives are defined in the regulations, *supra,* as hazards, the purport of the court's decision is simply that explosives are all dangerous *per se,* and that to describe them as dangerous is superfluous. If they are not dangerous explosives, there would have been no reason for including the items designated as "Class C explosives" in Parts 71-78 of the Commission's regulations dealing with the transportation of explosives and other dangerous articles, 49 CFR, *supra,* since those regulations were issued specifically under direction of Congress in section 835, Title 18, providing for proper regulations "for the safe transportation within the limits of the jurisdiction of the United States of Explosives *and other dangerous* articles". (emphasis supplied).

Class C ammunition or explosives, it goes without saying, are a highly important part of the military needs. The transcript of the hearing before the Com-

mission shows that the examiner understood the nature of the military need for Watson's service. In granting "dangerous explosives", he undoubtedly believed that the term was broad enough to include Class C explosives. It would most certainly have defied reason had he not realized that military installations lacking any motor carrier service at all would necessarily need Watson's service for the movement of all types of explosives customarily and regularly produced or stored at the installations in question and moving between such installations and points of military use or need. We submit that at the time he granted the authority, there was no reason for the examiner to have suspected that the authority recommended would not embrace all types of explosives. The application was filed September 30, 1947; the hearing was held February 3, 1949; the recommended report and order was served April 13, 1949 and became effective May 18, 1949; and the certificate was issued July 19, 1949. It was not until later that the Commission in *Strickland Transportation Co., Inc. Extension—Dangerous Explosives,* 49 M.C.C. 595, (decided August 24, 1949) *for the first time declared that dangerous explosives do not include Class C explosives,* predicating its conclusion upon the regulations governing the transportation of explosives and other dangerous articles, *supra.* Those regulations had not theretofore had any relation to grants of explosive authority in certificates of public convenience and necessity. To the contrary, they expressly stated in the first section that they related to the *mode of packaging, etc.* of explosives for transportation (49 CFR 71.1).

As stated, the *Strickland* decision undertook for the first time to make the regulations dealing with safety in transporting explosives, definitive of the scope of authority, commodity-wise, granted in certificates, even though not so stated in the certificate itself. The Commission order revoking Watson's Class C explosives authority in effect undertook to apply retroactively to that certificate a subsequently developed new policy with respect to the term "dangerous explosives", *a policy not in existence at the time Watson filed its application, at the time of the hearing, at the time the authority was granted, or at the time the certificate was issued.* The action of the Commission here is on all fours with the action it attempted in *United States* v. *Seatrain Lines,* 329 U.S. 424. There it undertook to revoke a certificate in part on the ground of alleged error. This court, however, held that there had been no error in granting the authority; that, to the contrary, the Commission was attempting to reopen an issued certificate so as to insert therein a newly-conceived policy, something that it could not lawfully do.

The grant of "dangerous explosives" to Watson included Class C explosives because they are described as of "minimum hazard", and as stated by the court in the *West Coast Fast Freight* case, *supra,* explosives that are hazards are dangerous. The grant to Watson did not restrict the authority to any definition contained in the Commission regulations covering the transportation of explosives and other dangerous articles. But in effect the Commission is reading into Watson's certificate just such a restrictive phrase, the very thing the Commission itself said it could not do in numerous cases reviewed and followed in *Coastal*

Tank Lines, Inc. v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289; sustained February 10, 1953 by unreported decision of the United States District Court for the District of Columbia.

We submit that the revocation of Watson's authority to transport Class C explosives cannot be justified on the ground of inadvertent error, and that the decision of the three-judge district court is correct.

3. The circumstances existing at the time the certificate was granted justified the conclusion of the three-judge court that no error was made in authorizing general commodities

The final error alleged by appellants to have been made in the certificate is the authority to transport general commodities. They assert that general commodities were inadvertently granted, and that since the grant exceeded explosives which was the only commodity found in the examiner's report to be required by the public convenience and necessity, the greater authority was invalid. Having presented no evidence in substantiation of the allegation of error, the issue necessarily had to be determined by the district court in the light of whether the grant was or was not consistent with the facts and circumstances existing at the time the certificate was issued. We submit that the district court, under the record in this case, correctly concluded that no error had been made.

As we have previously shown, the objective of the application was to give Watson a uniform certificate to transport general commodities and dangerous explosives over its entire system of routes, to be accomplished by deleting the restriction against handling "dangerous explosives". The Department of the Army witness not only strongly urged that this re-

striction be deleted from the existing routes but also urged that Watson be authorized to serve the four additional installations. In deleting the restriction, the examiner's report satisfied the requirement as to the existing routes where Watson already had general commodities. However, it fell short of meeting the requirements of the four installations where there was no service whatsoever and as to which no certificates were outstanding. It was reasonably apparent that the Government had need for the same service at the four installations commodity-wise that it was receiving from Watson at its other installations. In view of this, the substitution in the certificate of general commodities in lieu of dangerous explosives to and from these installations was entirely reasonable and compatible with the obvious requirements of the Army. It was likewise in furtherance of the national transportation policy which directs the Commission to administer the act so as to meet the needs of national defense. And having in mind that uniformity of authority was the objective of the application, it was but reasonable for the Commission to make the uniformity of commodities applicable with respect to the four new service points being brought within Watson's system of operations. That is precisely what the certificate accomplished. *Only by deliberate purpose could it have been framed to so adequately meet the situation disclosed of record.*

It may be that a fresh review of the matter, possibly through different eyes, may now cause the Commission to believe that an error *must* have been made four years ago. Changes in viewpoint, now arrived at, however, cannot retroactively render a perfectly reasonable act of four years ago an error as of the

time it occurred. Time inevitably diminishes recollections. The fact that the alleged error was permitted to continue for four years, that during that time Watson openly conducted the operation, that the Commission's field representatives in the territory as well as Watson's own competitors must have been fully aware thereof—all support our position that the Commission is now construing as an error what for four years was not so considered.

The certificate, having been officially issued with procedural regularity, must carry a presumption of correctness. The only thing offered by appellants to rebut this presumed correctness is the contention that it granted authority in excess of that applied for and as granted in the examiner's report. This deviation, however, does not *per se* establish error, nor render the certificate invalid. The Commission's power to grant authority in excess of that applied for is well established. *Hudson Boulevard Transit Lines, Inc.* v. *United States, et al.*, 77 F. Supp. 594. If the Commission can by an order change the scope of authority applied for, by the same reasoning it can by certificate change the scope of a preceding order. This is true because a certificate is nothing more than an order (it primarily consists of ordering paragraphs), and the only difference between it and other orders is that it is final and cannot subsequently be changed except in accordance with the provisions of section 212(a). The certificate is the final act or order that validates the operation. *Until its form and content are fixed by delivery to the carrier, the power to frame it in accordance with statutory directions persists. United States* v. *Rock Island Motor Transit Company, et al.*, 340 U.S. 419.

Appellants' contention that the certificate is invalid because not supported in the examiner's report by a finding of public convenience and necessity is hypercritical in the extreme. They are in effect using the contention that their own act is invalid as a means of sustaining their side of this controversy. This is difficult to reconcile with good conscience, for Watson, though the innocent party, alone would be injured if such contention were successful.

That the foregoing contention is but a matter of technical form rather than substance is obvious when we look at other actions of the Commission, the validity of which has never been questioned. For instance, a formal finding of public convenience and necessity for a two-way operation has been made even though the only evidence to support the finding of public convenience and necessity related to a one-way operation. *Aero Mayflower Transit Co.* v. *United States,* 95 Fed. Supp. 258. If a certificate is invalid because not preceded by a formal finding of public convenience and necessity, equally invalid should be a finding of public convenience and necessity which is unsupported by any evidence thereof. Apparently appellants would consider that a certificate is valid if supported by a formal finding of public convenience and necessity irrespective of whether such finding itself was valid. Another example is in those not infrequent cases where the Commission by interpretation of certificates increases the scope of the authority despite the lack of finding in the underlying order of public convenience and necessity for such increased authority. *Mural Trucking Service, Interpretation of Certificate—Store Equipment,* 63 M.C.C. 47.

The utter technicality of appellants position here is shown by *Robert T. Wilson and G. Bennett Wilson Extension—Dairy Products,* 61 M.C.C. 51. In that case the entire Commission issued a report finding that a proposed contract carrier operation would not be consistent with the public interest and national transportation policy and denying the application. This finding was comparable to a finding of lack of public convenience and necessity in a common carrier application. Applicant brought an action in the U. S. District Court, Western District of Missouri (Southwestern Division). That court in *Wilson and Wilson, d/b/a Wilson Bros.* v. *U. S., et al.,* 114 F. Supp. 814, held in effect that the Commission had erred in finding that no need existed for a portion of the proposed service. It set aside the Commission's order and remanded the proceeding to the Commission for further proceedings consonant with the views of the court. Significantly, the Commission did not appeal this decision which in effect directed a finding of need for the proposed service. Instead, the Commission reopened the matter for further hearing. At that hearing the applicant declined to submit further testimony on the ground that it was entitled to have the mandate of the court carried out on the basis of reconsideration of the record as made. Thereafter the Commission Division 5 reopened the proceeding for further hearing under shortened procedure for the expressed purpose of receiving verified statements (1) showing the fitness and ability of the newly-substituted applicant to perform the proposed service and (2) to receive evidence by the protesting carriers. It did not direct that the applicant present any additional evidence to support a need for the proposed service. Thereafter, the Commission Division 1 issued its report on further

proceedings, M.C.C. (MC-111290, Sub-No. 7, decided October 31, 1955) finding that the proposed operation would be consistent with the public interest and the national transportation policy and authorizing the issuance of a permit. This is a significant case because in effect the court directed the finding of a need for the service, and the Commission thereafter made such finding on the same record on which it previously was unable to do. If the argument of appellants is correct here that Watson's certificate is invalid because there was no finding by the Commission of public convenience and necessity as required by the statute, then the finding in the *Wilson* case dictated by the court and unappealed by the Commission is equally invalid as not representing a freely-found need by the Commission as required by section 209.

4. The court below having found that no error was made, the question as to the power of the Commission to correct an error is academic and needs no further argument

Appellants concede that the court below did not "in terms" hold that the Commission cannot correct inadvertent errors in a certificate without notice and hearing. They nevertheless assert that that is in effect what the court held. This contention is without merit. Before any issue could arise as to the power of the Commission to correct an error, a finding was necessary that an error had been made. Here the court found that the Commission's action was not the mere correction of a clerical error, *or in other words that no error had been made.* In that circumstance there was no need for the court to determine the Commission's power to correct errors, and had it done so it would have been pure dicta. Further comment on this academic matter seems unnecessary,

for certainly no substantial question has been raised by the decision of the court below as to the Commission's power or lack of power to correct error.

In substance the only question raised by appellants before this Court is simply whether or not the three-judge district court erred in concluding that none of the alleged errors had been made by the Commission in framing the certificate. It involves no question of law or statutory construction, and is entirely factual in nature. As we have shown, the district court was entirely justified in reaching the conclusion it did in the light of the circumstances before it. Its decision being reasonable and in no way arbitrary, a review by this court of such factual determination cannot possibly constitute a substantial question warranting further argument before this Court. Furthermore, the decision of the district court is anything but precedent-making and is unimportant insofar as concerns interstate commerce jurisprudence. The only parties to this suit are the Government and Watson. No other rail or motor carrier has ever raised any question as to the validity of Watson's certificate, and a lack of effect on them must be presumed therefrom. Aside from the injury to Watson that would result by an adverse decision, the only effect would be to deprive the Department of the Army of a motor carrier service which it has had available, and has used, since July 1949 in meeting its national defense operations. That the Commission cannot lawfully change the terms of a certificate where no error has been made has already been passed upon by this Court in the *Seatrain* case, *supra*.

We respectfully submit, therefore, that the appellants present no substantial question for the decision

of this Court, and that the judgment and decree of the district court should be affirmed.,

Respectfully submitted,

WATSON BROS. TRANSPORTATION CO., INC.,

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Dated: November 23, 1955

Proof of Service

I, Beverley S. Simms, one of the attorneys for Watson Bros. Transportation Co., Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of November, 1955, I served copies of the foregoing Motion to Affirm on the several parties thereto, as follows:

1. On the United States, by mailing a copy, in a duly addressed envelope, with postage prepaid, to The Solicitor General; Stanley N. Barnes, Esq., Assistant Attorney General; and Daniel M. Friedman, Esq. and William J. Lamont, Esq., attorneys, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel; and Leo H. Pou, Esq., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

.....

Attorney for Watson Bros. Transportation Co., Inc.
1624 Eye Street, N. W.
Washington 6, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 490

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WATSON BROS. TRANSPORTATION CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

1. Although appellee characterizes the question presented by this appeal as "entirely factual" (Motion to Affirm, p. 23), its own statement of facts shows that none of the important facts is in dispute and that the principal issue presented is a legal one. Appellee recognizes (Motion to Affirm, pp. 6-7) that the certificate grant of "general commodity" authority was greater than that which the Commission had found to be required by the public convenience and necessity, namely, authority to

haul dangerous explosives. It argues (Motion to Affirm, pp. 17-20), however, that since the Commission allegedly could have granted the greater authority on the basis of the evidence of record, its action in doing so cannot be deemed inadvertent error but must be treated as an intentional revision of the examiner's findings.

But, as we pointed out in our Jurisdictional Statement (pp. 7-9), the Act permits the Commission to grant only such authority as is found required by the public convenience and necessity, and the Commission found only a need for dangerous-explosives authority. Thus, the purported grant of authority to haul general commodities—which the Commission had not found to be so required—was a nullity. Appellee did not except to the examiner's finding that the public convenience and necessity required only the grant of authority to haul dangerous explosives, nor did it seek judicial review of the order after adoption by the Commission. Plainly, the issuance of a certificate containing greater authority than the Commission found to be justified was an inadvertent error. This case, therefore, squarely presents the legal issue whether the Commission can correct such error without recourse to revocation proceedings under Section 212(a) of the Act.

2. Appellee further argues that the Commission's corrective order was properly set aside because in two respects it revoked authority which

the Commission had properly granted in the original certificate pursuant to its findings of public convenience and necessity. First, it contends (Motion to Affirm, pp. 12-17) that the Commission's finding that the public convenience and necessity required appellee to haul "dangerous explosives" entitled appellee to a certificate authorizing it to haul Class C explosives, and that the corrected certificate improperly revoked that authority by limiting it to Class A and Class B explosives. Second, appellee states (Motion to Affirm, pp. 9-11) that the original certificate correctly granted it authority to serve the four Army installations as "off route points" in connection with its "authorized regular and irregular route operations," and that the corrected certificate revoked that authority, *pro tanto,* by restricting appellee to serving the points in connection with its regular route only.

We disagree with both contentions. But assuming *arguendo* their correctness, at most they would have authorized the court to direct that the corrected certificate be modified so as to permit appellee to haul *explosives* of all classes to and from these off-route points in connection with its irregular operations. Plainly, they do not support the court's action in setting aside the Commission's order in its entirety, a result which permits appellee to haul *general commodities* to such points.

It is therefore respectfully submitted that the

motion to affirm should be denied, and that this Court should note probable jurisdiction.

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DANIEL M. FRIEDMAN,
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DECEMBER 1955.

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No. 490. UNITED STATES ET AL. *v.* WATSON BROS. TRANSPORTATION CO., INC. Appeal from the United States District Court for the District of Nebraska. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE BURTON would note probable jurisdiction. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, William J. Lamont, Robert W. Ginnane* and *Leo H. Pou* for appellants. *Harold G. Hernly* and *Beverley S. Simms* for appellee. Reported below: 132 F. Supp. 905.